

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 10 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JAMES DARRYL ALLEN

Petitioner - Appellant,

v.

GAIL LEWIS

Warden, Pleasant Valley State Prison
Respondent - Appellee.

No. 05-17050

D.C. No. CV-99-20054-RMW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, Jr., District Judge, Presiding

Argued and Submitted July 26 , 2006
San Francisco, California

Before: SILVERMAN and RAWLINSON, Circuit Judges, and BERTELSMAN,
Senior District Judge.**

* This disposition is not appropriate for publication and may not be cited to or
by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable William O. Bertelsman, Senior United States District
Judge for the Eastern District of Kentucky, sitting by designation.

Darryl Allen appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition, which claimed he had been denied the effective assistance of counsel during his trial for the robbery of a Goodwill store. We affirm.

It is well established that to succeed on a claim of ineffective assistance of counsel, the petitioner must show both that his counsel's performance was constitutionally deficient, and that his counsel's deficient performance prejudiced him in such a manner as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for counsel's performance is that of reasonableness. *Id.* Judicial scrutiny of counsel's performance must be highly deferential, and the petitioner must overcome the presumption that the challenged action might be considered a reasonable trial strategy. *Id.* at 689.

The petitioner challenges his counsel's assistance in two respects. First, he asserts that counsel was ineffective because he failed to object to the prosecutor's reference to him and a known accomplice as being brothers when the evidence did not support such a statement. Second, he asserts that counsel failed to call two witnesses that would have provided exculpatory evidence.

The court finds that the trial court did not err in holding that the state court properly applied *Strickland* when it found that defense counsel's conduct constituted a reasonable strategy. It is reasonable that defense counsel decided not

to object to the prosecution's reference to the two being brothers because: 1) the evidence had established a familial relationship and counsel found that the specific relationship was not a critical distinction; 2) counsel did not want to add credibility to the prosecutor's insinuation that this fact had any relevance to the issue of who robbed the store; and/or 3) counsel did not want to appear to the jury to be desperate, argumentative or hyper-technical.

In addition, it is also evident from the transcript that defense counsel had a reasonable strategy not to call the witnesses at issue. Although the witnesses possessed information that would aid the defense, they also possessed damaging testimony that connected the petitioner to a motorcycle that was similar to the one used in the robbery.

Moreover, even if the petitioner could overcome the presumption that his counsel's decisions were sound trial strategy, the conviction will not be set aside absent a showing that he was actually prejudiced by counsel's conduct.

Strickland, 466 U.S. at 691. The petitioner did not meet this burden.

AFFIRMED.